Office - Supreme Court, U.S.
FILED
NOV 30 1983
ALEXANDER L. STEVAS,
CLERK

No. 83-271

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
Petitioner,

vs.

THE BOARD OF REGENTS OF THE UNIVERSITY OF OKLAHOMA, a Public Body Corporate, and THE UNIVERSITY OF GEORGIA ATHLETIC ASSOCIATION, a Non-Profit Corporation,
Respondents.

BRIEF OF AMICUS CURIAE NATIONAL FEDERATION OF STATE HIGH SCHOOL ASSOCIATIONS IN SUPPORT OF PETITIONER

GERALD A. CAPLAN
ALEXANDER HALPERN
CAPLAN AND EARNEST
1301 Spruce Street, Suite 300
Boulder, Colorado 80302
Telephone: (303) 443-8010
Attorneys for Amicus Curiae National Federation of State High School Associations

Pandick Press Midwest, Inc., Chicago • 454-7600

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES CITED	ii
THE INTEREST OF THE AMICUS CURIAE	1
SUMMARY OF ARGUMENT	5
ARGUMENT	7
I. THE COURT OF APPEALS ERRED IN HOLDING THAT THE NCAA TELEVISION PLAN IS UNLAWFUL PER SE UNDER THE SHERMAN ACT	7
A. The NCAA Is Not a True Commercial Enterprise	8
B. The NCAA Television Plan Enhances Competition by Maintaining Balance Among its Members' Teams and Their Larger Educational Programs and Advances the Interests of Educational and Amateur Integrity	11
II. NCAA REGULATION OF TELECASTING OF INTERCOLLEGIATE FOOTBALL IS REASONABLE AND BENEFICIAL	14
CONCLUSION	21

TABLE OF AUTHORITIES

Cases

	PAGES
Arizona v. Maricopa County Medical Soc., 457 U.S. 332 (1982)	8
Board of Regents of Univ. of Okla. v. National Collegiate Athletic Ass'n, 561 P.2d 499 (Okla. 1977)	9, 10
Board of Trade of City of Chicago v. United States, 246 U.S. 231 (1918)	14
Bridge Corp. of America v. American Bridge League, Inc., 428 F.2d 1365 (9th Cir. 1970)	13
Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 444 U.S. 1 (1979)	8, 11
Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977)	7, 8
Deesen v. Professional Golfers' Ass'n, 358 F.2d 165 (9th Cir. 1966)	13
Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975)	8
Hennessey v. National Collegiate Athletic Ass'n, 564 F.2d 1136 (5th Cir. 1977)	9, 10, 14
Northern Pac. R. Co. v. United States, 356 U.S. 1 (1958)	7
Standard Oil Co. v. United States, 221 U.S. 1 (1911)	7
United States v. National Football League, 116 F. Supp. 319 (E.D. Pa. 1953)	13
United States v. Trenton Potteries, 273 U.S. 392 (1927)	11
Warner Amex Cable Communications, Inc. v. American Broadcasting Companies, Inc., 499 F. Supp. 537 (S.D. Ohio 1980)	9
White Motor Co. v. United States, 372 U.S. 253 (1963)	8

Statutes

	PAGES
15 U.S.C. § 1	3
15 U.S.C. §§ 1291 *et seq*	15
15 U.S.C. § 1293	16, 19

Other

Hearings before the Antitrust Subcommittee of the Committee of the Judiciary, House of Representatives, Eighty-Ninth Congress, Second Session, on S. 3817 (1966)	16, 18
112 CONG. REC. 21,311 (1966)	20

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
Petitioner,

vs.

THE BOARD OF REGENTS OF THE UNIVERSITY OF OKLAHOMA, a Public Body Corporate, and THE UNIVERSITY OF GEORGIA ATHLETIC ASSOCIATION, a Non-Profit Corporation,
Respondents.

BRIEF OF AMICUS CURIAE NATIONAL FEDERATION OF STATE HIGH SCHOOL ASSOCIATIONS IN SUPPORT OF PETITIONER

The amicus curiae National Federation of State High School Associations ("National Federation"), by its attorneys, Caplan and Earnest, submits the following Brief in the above-captioned action.

THE INTEREST OF THE AMICUS CURIAE

This Brief is submitted in support of the Petitioner, National Collegiate Athletic Association ("NCAA").

The National Federation is a voluntary association whose membership includes the state high school activities associations of the fifty states and the District of Columbia and their counterparts in the ten provinces of Canada, the Phillipine Islands, Guam, Okinawa and the Virgin Islands. Through its

members, the National Federation represents the interests of some 18,000 public and private high schools in the United States and 2,200 high schools of the other members. The total number of students within these schools is about 12,660,000. The athletic and academic events sponsored by the member associations of the National Federation draw some 1.2 billion spectators annually.

The basic purposes of the National Federation, as stated in Article II of its Constitution, are as follows:

> The object of this Federation shall be to serve, protect and enhance the interstate activity interests of the high schools belonging to the state associations, to assist in those activities of the state associations which can best be operated on a nationwide scale, to sponsor meetings, publications and activities which will permit each state association to profit by the experience of all other member associations and to coordinate the work so duplication will be minimized. [Footnote omitted.]

In furtherance of these purposes, the National Federation represents the interests of the high schools before the United States Congress, the United States Olympic Committee, all major national amateur sports governing bodies and national education associations. In short, the National Federation serves as the voice of the athletic interests of the nation's high schools and can be characterized as the "NCAA" of high school sports.

While the function of the National Federation and its member associations includes all interscholastic sports and academic competitions, such as speech and music, its particular interest in this action is interscholastic football. There are some 15,061 high schools which compete in interscholastic football sponsored by members of the National Federation, and just under one million high school football players.

Every Friday night beginning in September and continuing into December of each year, literally thousands of organized interscholastic football games are played across the United States. These games are conducted by the high schools as an

extracurricular activity within their educational programs. This is a tradition which has existed in many locales for over a half century. Local high school football games are an unparalleled community event, particularly in the smaller cities and towns and in rural areas. Likewise, for hundreds of thousands of young people, high school football is the athletic experience of a lifetime. Moreover, high school football is a special revenue source for the schools. Football is one of the few, and often the only, high school extracurricular activities which not only pays for itself but supports other activities.

Thus, to the extent, discussed further hereinafter, that the ruling of the Tenth Circuit Court of Appeals in this action threatens the continuing viability of high school football, it threatens even more the broad spectrum of other interscholastic competitions that compose the extracurricular activities of the 20,200 high schools represented by the National Federation.

The Court of Appeals adopted the premise that intercollegiate football and the sale of telecasting rights therein is strictly a business and, like any business, is and should be dominated by the purpose to maximize revenues. The holding that the NCAA telecasting controls violate the Sherman Antitrust Act, 15 U.S.C. §1, and are illegal result from this initial premise. The culmination is the order prohibiting the NCAA from exercising regulatory control over its members' sale of the telecasting rights to their games and, conversely, affirming the preeminent right of a college or university to sell those rights to any entity, at its discretion.

This conclusion particularly concerns the National Federation because it exposes the high schools to the prospect of live intercollegiate football telecasts on Friday nights in direct competition with high school stadium attendance. The mandate of ungoverned college football telecasts permits and, in the

competitive atmosphere which would thereby develop, encourages collegiate encroachment upon high school football night. While the Court of Appeals has mitigated this risk, at least theoretically, by holding that restriction of collegiate football telecasts on Friday nights is not within the violations found, the National Federation can only perceive the situation as extremely threatening.

The result would be devastating for high schools. As public or nonprofit institutions, every spectator dollar received by the high schools goes back into program. Even a marginal loss due to the broader appeal of televised college games can only damage the educational programs provided to the nation's school children. And the threat of greater losses is undeniable.

While the financial interest of the National Federation is the more easily described element of concern, it is neither the only nor the predominant one. The National Federation, like the NCAA, is dedicated to the concept that scholastic, amateur athletics are and should be integrated with the larger educational purposes to which the high schools, colleges and universities are devoted. High school and collegiate athletics *are* different from the "strictly business" approach of, for example, professional football. Both the National Federation and the NCAA extend the greatest attention to the maintenance of standards of amateurism, broad participation by students through varied athletic programs at member institutions and enforcement of academic eligibility requirements. This is not a "business" policy but an educational policy—and one which the majority of the Court of Appeals ignored entirely.

For these reasons, the National Federation has sought leave to appear as an amicus curiae supporting the NCAA regulations in issue.

SUMMARY OF ARGUMENT

I. THE COURT OF APPEALS ERRED IN HOLDING THAT THE NCAA TELEVISION PLAN IS UNLAWFUL PER SE UNDER THE SHERMAN ACT.

Per se treatment under the antitrust laws is appropriate only when the courts have considerable experience with the restraint in question and it has been found to be manifestly anticompetitive. The NCAA television plan exists within a unique context predominantly oriented toward maintenance of educational quality and amateur athletic integrity. To judge this agreement by standards developed in a purely commercial context is erroneous.

The NCAA television plan enhances competition by maintaining a necessary athletic balance among its member institutions. Such balance is an economic necessity in the particular context of athletic team competition. Moreover, by limiting commercial competition for revenues and distributing both television income and exposure, the television plan preserves the larger athletic programs of its members and prevents commercialization destructive of amateur athletics. These are both economic and educational virtues the consideration of which precludes per se antitrust treatment.

II. NCAA REGULATION OF TELECASTING OF INTERCOLLEGIATE FOOTBALL IS REASONABLE AND BENEFICIAL.

Intercollegiate football operates within a larger market which includes professional and interscholastic football. These three participants are interdependent, and cooperative allocation of their market is mutually beneficial. Direct competition of NCAA telecasts and high school football games on Friday nights would be disastrous to the high schools, to the detriment of the NCAA members.

The NCAA television plan prevents this danger by precluding Friday night college football telecasts. This benefits the public at large which has a compelling interest in the education system. Such regulation is reasonable and should be preserved. The perception of intercollegiate football as a purely commercial venture to be governed as a matter of law by a principle of unregulated competition misperceives the totality of the interests involved and directly threatens the athletic programs not only of the colleges and universities, but of the nation's high schools as well.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN HOLDING THAT THE NCAA TELEVISION PLAN IS UNLAWFUL PER SE UNDER THE SHERMAN ACT.

As an amicus curiae, the National Federation anticipates that the NCAA will more fully brief the specific antitrust issues involved in this action. It is our more general purpose to argue first that under all of the circumstances the Court of Appeals erred in holding the NCAA television plan unlawful per se under the Sherman Act, but that the "rule of reason" analysis should be employed. Thereafter, we set forth the justifications for the television plan in the context of the larger competitive football market, with particular emphasis on the concerns of high school athletics.

It is familiar law that although Section 1 of the Sherman Act literally prohibits "every contract, combination... or conspiracy, in restraint of trade or commerce," this Court early established the rule of reason as the prevailing standard of review. *Standard Oil Co. v. United States,* 221 U.S. 1 (1911). Over time, certain exceptions to the otherwise necessary rule of reason analysis developed as the Court identified forms of business conduct which were "manifestly anticompetitive" and, therefore, unlawful per se. *Continental T.V., Inc. v. GTE Sylvania Inc.,* 433 U.S. 36 (1977).

Per se antitrust violations are limited to those:

> [A]greements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore, illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.

Northern Pac. R. Co. v. United States, 356 U.S. 1, 5 (1958).

The application of per se treatment constitutes an inflexible judicial conclusion as to the social utility, under any circum-

stances, of a particular practice, foreclosing the possibility of justification. *See, Continental T.V., Inc. v. GTE Sylvania Inc., supra,* at 49, n. 15; *Arizona v. Maricopa County Medical Soc.,* 457 U.S. 332 (1982). Therefore, a per se rule is not applied until the courts have gained considerable experience with the challenged restraint and have found it to have no purpose except stifling of competition. *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.,* 444 U.S. 1 (1979) ("*Broadcast Music*"); *White Motor Co. v. United States,* 372 U.S. 253 (1963).

A. The NCAA Is Not a True Commercial Enterprise.

The majority of the Court of Appeals presumed, without a thorough discussion, that the context within which the NCAA television plan operates does not distinguish it from the strictly commercial enterprises within which the per se rule was developed. As Judge Barrett noted in dissent, this failure to consider the NCAA's unique function as an association of educational institutions is fundamentally unsound.

This Court has recognized that in determining the appropriateness of per se treatment, special aspects of the area of commerce involved, such as public service or comparable features, are pertinent. *Goldfarb v. Virginia State Bar,* 421 U.S. 773, 778, n. 17 (1975). Such features can and do make it unrealistic to categorize the NCAA's activities with those of an unalloyed commercial nature.

Every other court of the few which have scrutinized the NCAA television plan under the antitrust laws has acknowledged the existence of special considerations:

> [A] practice that would be declared invalid per se if it occurred in a purely commercial context should not be subject to a per se rule in the context of singularly commercial and educational activities with which no court has had considerable experience.

Warner Amex Cable Communications, Inc. v. American Broadcasting Companies, Inc., 499 F. Supp. 537, 545 (S.D. Ohio 1980). *See also, Hennessey v. National Collegiate Athletic Ass'n*, 564 F.2d 1136 (5th Cir. 1977); *Board of Regents of Univ. of Okla. v. National Collegiate Athletic Ass'n*, 561 P.2d 499 (Okla. 1977).

That the purposes of the NCAA are indeed a mixture of the commercial and educational, with an ultimate reference to the latter, is unequivocal. They are plainly stated in the "Principles" for football television activities adopted for the years 1982 and 1983 under which the challenged contracts were negotiated.

> The purposes of the program and any detailed plan or agreements devised thereunder shall be to *reduce* insofar as possible *the adverse effects of television in its various forms upon football game attendance and, in turn, upon the athletic and related educational programs dependent upon the proceeds therefrom;* to spread football television participation among as many colleges as practicable; to *reflect properly the image of universities as educational institutions;* to promote college football through the use of television; to advance the overall interests of intercollegiate athletics, and to provide college football television to the public to the extent compatible with these other objectives.

Plaintiffs' Exhibit 79 [emphasis added].

It should be obvious that the NCAA operates within an area of commerce characterized by more than a commercial or "strictly business" perspective. The overriding concern of the NCAA, its reason for existence, is not to profit but to further the educational purposes of its membership. Thus, the "Fundamental Policy" stated in the NCAA Constitution is as follows:

> The competitive athletic programs of the colleges are designed to be a vital part of the educational system. A basic purpose of this Association is to *maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body* and, by so doing, retain a clear line of demarcation between college athletics and professional sports.

1982-83 NCAA Manual, Plaintiffs' Exhibit 1-A [emphasis added].

This is scarcely the mandate of a commercial venture. On the contrary, it states a basic purpose to preserve educational values and amateurism, as opposed to professionalism, in the face of potential commercialization. Appropriately, the colleges and universities have joined together in their intercollegiate sports association to affirm and mutually enforce their foremost interest, educational quality. Application of per se antitrust law developed in purely commercial contexts to the NCAA would perpetrate a gross disservice upon the educational institutions.

This was recognized by the Fifth Circuit Court of Appeals in *Hennessey v. National Collegiate Athletic Ass'n, supra,* at 1152, where it stated, in the context of a group boycott claim, that:

> While this court has declined to grant the NCAA and its members a total exemption from the antitrust laws, it does believe that, *given the nature and purposes of the NCAA and its member institutions,* this particular restraint...is not a *per se* violation of the antitrust laws. [Emphasis added.]

Accord, Board of Regents of Univ. of Okla. v. National Collegiate Athletic Ass'n, supra, at 505-06.

In its opinion, the Court of Appeals has subjugated the NCAA's educational goals entirely to the commercial aspect of athletics telecasting. This is a fundamental misperception. Most unfortunately, it is the sort of error which threatens to be self-fulfilling. By presuming that college football is fundamentally a business enterprise, the Court forces that conclusion upon the member institutions of the NCAA, contrary to their larger purposes, subverting decades of effort to preserve the educational and amateur integrity of college sports.

From this basic error follows the entirely unwarranted legal conclusion that the NCAA television plan, merely one aspect of its greater function, is a restraint of trade sufficiently

familiar to require invalidation on a per se basis. This conclusion and the analysis dependent thereon should be rejected by this Court.

B. The NCAA Television Plan Enhances Competition by Maintaining Balance Among its Members' Teams and Their Larger Educational Programs and Advances the Interests of Educational and Amateur Integrity.

Without describing the NCAA television plan in depth, it functions by aggregating the games of the member institutions for sale as a package and allocates, to an extent, the benefits of the income and the television exposure among those members by setting telecasting conditions.

The Court of Appeals found that the NCAA television plan constituted "price fixing" and was unlawful per se. While price fixing is among those practices characterized as per se violations, *United States v. Trenton Potteries*, 273 U.S. 392 (1927), the term itself is merely a shorthand description of certain forms of business behavior which have been found to fall within the larger category of per se unreasonable restraints of trade. As such, a literal application of the term to every agreement among potential competitors to fix a price for their product is "overly simplistic and often overbroad," for not every agreement which fixes a price is conclusively anticompetitive and without redeeming value. *Broadcast Music, supra*, at 8-9.

Thus, before an agreement like the NCAA television plan is labeled "per se price fixing" some inquiry, short of full blown rule of reason analysis, must be made to determine:

> [W]hether the effect and, here because it tends to show effect, the purpose of the practice are to threaten the proper operation of our predominantly free-market economy—that is, whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output, and in what portion of the market, or instead one designed to "increase economic

> efficiency and render markets more, rather than less, competitive."

Id., at 19-20 [footnote and citations omitted].

The NCAA has advanced several justifications for its television plan. Among these, the concept of maintenance of athletic balance was rejected by the Court of Appeals as a "noneconomic justification." In so doing, the Court entirely ignored the unique quality of sports league competition and the larger role which the significant revenues from the popularity of intercollegiate football play in the maintenance of college sports generally. Two genuinely economic factors are involved—the maintenance of balanced football competition and the preservation of the athletic curricula of the member schools.

Sports leagues are peculiar in themselves with respect to interteam business competition. Each team in any league requires the coexistence of athletically competitive opponent teams or the league degenerates, to the ultimate loss of every team. Professional football is an excellent comparison:

> *Professional football is a unique type of business.* Like other professional sports which are organized on a league basis *it has problems which no other business has.* The ordinary business makes every effort to sell as much of its product or services as it can. In the course of doing this it may and often does put many of its competitors out of business. The ordinary businessman is not troubled by the knowledge that he is doing so well that his competitors are being driven out of business.
>
> *Professional teams in a league,* however, *must not compete too well with each other in a business way.* On the playing field, of course, they must compete as hard as they can all the time. But it is not necessary and indeed it is unwise for all the teams to compete as hard as they can against each other in a business way. If all the teams should compete as hard as they can in a business way, the stronger teams would be likely to drive the weaker ones into financial failure. If this should happen not only would the weaker

> teams fail, but eventually the whole league, both the weaker and the stronger teams, would fail, because without a league no team can operate profitably.
>
> • • •
>
> *The member clubs of the National Football League, like those of any professional athletic league, can exist only as long as the league exists. The League is truly a unique business enterprise,* which is entitled to protect its very existence by agreeing to reasonable restrictions on its member clubs.

United States v. National Football League, 116 F. Supp. 319, 323, 326 (E.D. Pa. 1953) [emphasis added]. *See also, Bridge Corp. of America v. American Bridge League, Inc.*, 428 F.2d 1365 (9th Cir. 1970); *Deesen v. Professional Golfers' Ass'n*, 358 F.2d 165 (9th Cir. 1966) (rule of reason applied to "group boycotts" intended to preserve fair competition).

This same consideration, to preserve the entire system of commerce and competition among the members thereof by regulating business competition between the members, is present in the NCAA.

> A goal of the NCAA, one which is endowed with certain benefits to society, is to "retain a clear line of demarcation between college athletics and professional sports." *Colleges with more successful programs, both competitively and economically, were seen as taking advantage of their success by expanding their programs, to the ultimate detriment of the whole system of intercollegiate athletics.* Financial pressures upon many members, not merely to "catch up," but to "keep up," were beginning to threaten both the competitive, and the amateur, nature of the programs, leading quite possibly to abandonment by many. "Minor" and "minority" sports were viewed as imperiled by concentration upon the "money makers," such as varsity football and basketball.
>
> [The NCAA regulation in question] was, with other rules adopted at the same time, intended to be an "economy measure." In this sense it was both in design and effect one

> having commercial impact. But *the fundamental objective in mind was to preserve and foster competition* in intercollegiate athletics—by curtailing, as it were, potentially monopolistic practices by the more powerful—*and to reorient the programs into their traditional role as amateur sports operating as part of the educational processes.*

Hennessey v. National Collegiate Athletic Ass'n, supra, at 1153 [emphasis added].

The *Hennessey* case summarizes well the reasons why the antitrust rule of reason is necessary in this case. Both educational and commercial purposes require that the NCAA regulate the competition for telecasting revenues among its members. Uncontrolled competition for revenues distorts the function of athletics in an educational program. Among the successful, such competition threatens to elevate a portion of the educational program to an unhealthy predominance over all others. Among the unsuccessful, the threat is to their financial ability to continue a broad athletic program for many students and to maintain the athletic aspect of the schools' curricula. Furthermore, such competition endangers the system within which athletics as a purely commercial endeavor take place. Domination by a few at the expense of all others destroys the system within which all operate and upon which all rely. From both perspectives, the conclusion that the NCAA television plan lacks any redeeming virtue and is plainly anticompetitive is unsupportable.

II. NCAA REGULATION OF TELECASTING OF INTERCOLLEGIATE FOOTBALL IS REASONABLE AND BENEFICIAL.

Justice Brandeis described the nature of the antitrust rule of reason analysis in *Board of Trade of City of Chicago v. United States,* 246 U.S. 231, 238 (1918):

> *The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition, or whether it is such as may suppress or even*

> *destroy competition.* To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint, and its effect, actual or probable. The history of the restrain, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation, or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences. [Emphasis added.]

The particular aspect of the larger football market within which the NCAA telecast controls operate which is of special importance to the National Federation is that it includes three major participating systems—professional, intercollegiate and interscholastic football. Each of these systems is interrelated by mutual interest. The colleges draw their talent from the high schools, *see* Testimony of Brice Durbin, Transcript at 1106, ff. 6-11, and the professionals draw their talent from the colleges. While the three systems share an overlapping audience and can, therefore, be perceived as competitors in one sense, the prosperity of each is beneficial to all three and to the public interest.

This unusual condition has brought about a cooperative allocation of audience time between the systems whereby the high schools play on Friday nights, the colleges on Saturdays and the professionals on Sundays during their regular seasons. In this manner, no system encroaches upon the others through contemporaneous telecasts of games which would draw upon their common audience. In many ways, high school football, which neither has nor is likely to develop a significant television audience and is solely dependent on stadium attendance for income, is the greatest beneficiary of this arrangement.

With respect to professional football, the division of days is codified in the Professional Sports Telecasting Act, 15 U.S.C.

§§1291 *et seq.* By that Act, Congress exempted professional football, and other professional sports leagues, from the antitrust laws for league sales of the telecast rights of members' games. The exemption is limited by 15 U.S.C. §1293 which removes the antitrust protection for all contracts of sale which permit telecasts of professional football games on Friday nights or Saturdays in conflict with high school or college games.

The effect of this exception is to preclude professional football telecasts on Fridays and Saturdays and, thereby, to protect interscholastic and intercollegiate football. The Senate Committee on the Judiciary, in its report on S. 3817, the bill which amended the Act in 1966, stated its purpose as follows:

> The proposed legislation also extends to high schools the same protection from the telecasting of professional football games that has already been accorded to the colleges. That protection prohibits the telecasting of a professional football game from a telecasting station located within 75 miles of the game site of a college or high school game. The protection extends from 6 o'clock p.m. on the second Friday in September until the second Saturday in December.
>
> * * *
>
> The committee views the *practice of telecasting professional football games at those times traditionally used for the playing of high school and college games as a serious threat to the scholastic athletic programs.* The committee intends to maintain a close scrutiny on this practice with a view of determining at a later date whether further legislation is necessary to circumscribe such a practice.

Hearings before the Antitrust Subcommittee of the Committee of the Judiciary, House of Representatives, Eighty-Ninth Congress, Second Session, on S.3817 (1966), at 5-6 [emphasis added] (hereinafter "*Antitrust Hearings*").

Of course, competing intercollegiate football telecasts on Friday nights would have the same adverse effect on the high

schools. Testimony of Brice Durbin, Transcript at 1107, ff. 16-25; 1108, ff. 1-16; 1109, ff. 12-16; 1110, ff. 5-22. The NCAA has consistently provided telecast protection to the high schools on a cooperative basis. *Id.*, at 1106, ff. 19-25; 1107, ff. 1-6. The 1982-1985 NCAA Football Television Plan specifies that other than on the special Friday following the Thanksgiving holiday, games offered for telecast through the Plan will be held on Saturdays. The Plan permits Friday night telecasts only where no appreciable damage will be done to a conflicting high school game by the telecast. Defendant's Exhibit LT.

This NCAA rule does restrict the ability of its members freely to sell the telecast rights to their games. In a system of open competition for television dollars, the colleges would be financially compelled to override the reservation of Friday nights for the high schools. The loss of Friday nights would end the viability of high school football. Representative Robert L. Leggett, a cosponsor of the 1966 amendment to the Professional Sports Telecasting Act, spoke to this issue in the related context of professional football telecasts:

> It is imperative that the High Schools of America be protected on Friday nights against Professional Football. The television [sic] of Professional Football games on these nights will have a severe, adverse effect on High School football games.
>
> In order to meet the cost of having a creditable football and athletic program, the high schools have traditionally held their games on Friday evenings. In many of the smaller communities the Friday night football game is the unifying social function of all the residents of the area.
>
> If High School football had to compete against televised Professional Football games, the gate receipts, upon which most schools rely for carrying on their athletic programs would be seriously in danger. Such a practice would, I fear, prove disastrous to High School football in this country.

Antitrust Hearings, supra, at 108.

Just as the NCAA is properly concerned with the destructive effects of unbridled, commercial competition for television contracts within its membership, so its cooperative protection of high school football from the same danger is appropriate in light of the larger interests of scholastic athletics. Healthy high school competition stimulates and enhances intercollegiate competition. The two share a symbiotic relationship—their mutual strength exceeds their separate strengths. The ultimate beneficiaries are the student athletes, spectators, educators, parents and alumnae, and the general public which has a compelling interest in its education system.

The National Federation urges this Court to take the foregoing into account among the circumstances relevant to the reasonability of the NCAA television plan. High school and intercollegiate football are not and should not be forced by law and against their own desires and the public interest to become business competitors. The truth of this statement is independent of but draws great urgency from the fact that such competition would be ruinous for the high schools. The NCAA and the National Federation are partners in the national education system and cooperation is their natural and reasonable relationship. While it may not be demeaning to acknowledge a commercial element subject to antitrust review in interscholastic football, it is utterly callous to subordinate all other elements to the commercial.

Intercollegiate football is an endeavor which requires internal regulation to function. The NCAA as regulator did not impose itself upon its members. Rather, it came into existence on their initiative and in the recognition of a need. Television and the revenues and prestige made possible by national exposure created an unprecedented opportunity for the colleges, but introduced a danger which threatened the existence of the system upon which their programs depend. What the

District Court saw as a progressive "commandeering" of members' property rights is more accurately described as a gradual, principled incorporation through group action of the opportunity presented, in light of the accompanying risk.

As we have stated, this risk extends beyond the NCAA to the high school programs. Just as Congress acted to protect the colleges and high schools from professional football telecasts, so the NCAA has acted to protect the high schools from college competition through its television plan. This action should be understood as a reasonable regulation intended and functioning to promote competition within the NCAA and to maintain the integrity of the educational process at the college and high school levels. In this latter respect, the controls advance a significant public interest outside of the antitrust field but of at least equal dignity.

It is this public interest which the Court of Appeals failed to consider sufficiently but which lies at the heart of this action. The nature of the interest and the real harm threatened were ably described by Representative Grider of Tennessee speaking in support of the 1966 amendment to 15 U.S.C. §1293:

> That competitive athletics are an integral part of our educational process; that they provide a challenge which transcends mere physical ability—a challenge of the mind, of the attitude, of the spirit—cannot be denied. It is the same type of spirit which molded a nation less than two centuries ago....
>
> The basis of high school football—of all high school athletics—is spirit: The roar of enthusiasm from a hundred classmates; the unrestrained cheer of a thousand fans; or, in the words of Grantland Rice, just the "tumult and the shouting." The low, but audible, hum of approval from the grandstand provides inspiration. The skill, agility and prowess of the athlete then make him react. Inspiration and skill help to transform the young athlete into a man.
>
> The loss of the spectator means the loss of the principal source of financial support for all high school athletics.

The revenue derived from these football games pays for vast facilities for physical education and recreational athletics; it pays for football helmets, baseball bats, basketballs. The revenue that the spectator provides at a high school football game is needed. But the fan provides something far more important. He infuses spirit. The loss of the fan means the loss of sports vitality.

Today, the existence of high school football—a Friday night event in virtually every high school town in the country—is threatened by television. Professional football is scheduled to be shown on television Friday nights. Just as mass televising of major league baseball wrecked the minor leagues. So professional football is devouring its young.

112 CONG. REC. 21,311 (1966).

CONCLUSION

For the foregoing reasons, the National Federation submits that this Court should reverse the holding of the Court of Appeals and rule that the NCAA television plan is not unlawful per se under the antitrust laws. The Court should further hold that the NCAA television plan is not unlawful under appropriate rule of reason review. In the alternative and at least, the Court should hold that the injunction issued by the District Court and modified by comment of the Court of Appeals is overbroad and unnecessarily restrictive of the scope of permissible regulation which the NCAA may exercise over the telecasting of football games of its member institutions, with particular reference to the interest of high school athletics.

Respectfully submitted,

GERALD A. CAPLAN
ALEXANDER HALPERN
CAPLAN AND EARNEST
1301 Spruce Street, Suite 300
Boulder, Colorado 80302
Telephone: (303) 443-8010
Attorneys for Amicus Curiae National Federation of State High School Associations